

KEYWORD: Guideline E

DIGEST: The Board cannot determine with confidence that the Judge based his decision on available record evidence . The Judge’s language in footnote 2 of the decision suggests that the Judge may well have excluded or seriously discounted relevant record evidence without adequate justification. Favorable decision remanded.

CASENO: 05-06723.a1

DATE: 11/14/2007

DATE: November 14, 2007

In Re:)	
)	
-----)	ISCR Case No. 05-06723
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Joyce E. Peters, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 10, 2006, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 19, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge’s analysis failed to consider the case in light of the record as a whole; and whether the Judge’s whole person analysis is arbitrary and capricious in that he failed to consider significant contrary record evidence and whole person factors. Finding error we remand the case to the Judge for the issuance of a new decision.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following findings: Applicant is employed by a federal contractor. Married with two children, he holds a bachelor’s degree and has served in the Coast Guard.

While serving with a police department, Applicant was demoted from police corporal to police officer for having made a false statement to an internal affairs investigation. Specifically he denied having spoken with another police official about the matter under investigation, although he subsequently acknowledged that he had in fact done so. He stated that he made the false statement to protect the official, whom he subsequently married. Applicant filed a grievance over the demotion, but his superiors affirmed the decision.

Applicant received a counseling for failing to complete an accident report. He had responded to an accident and did not obtain local contact information for one of the parties. He submitted the report without the information, despite having been directed to obtain it by his supervisor. Approximately a month after this, Applicant received a “supervisory contact” for improper use of sick leave. The Judge found that Applicant’s supervisor harassed him for reasons connected with “racial issues.”¹ Applicant called in sick because he could not stand the harassment.

Applicant received administrative discipline for two other incidents, one in which he failed to turn in a confiscated license plate, having placed it in the trunk of his police car and then turning the car over to another officer before retrieving it. On another occasion he received administrative discipline for having placed a personally owned “blue light” on an unmarked police car, although the police manual permitted the use only of attached equipment.

In 2003 Applicant arrested a suspect for possession of crack cocaine. The Judge stated that the suspect accused Applicant of using excessive force, which Applicant “vigorously denied.”² The Judge went on to find: “The government alleges that he was investigated by the internal affairs department, and it was recommended that he be terminated. Applicant never received any written

¹Decision at 3.

²Decision at 4.

notice about the action, his final performance review summary makes not mention of the incident, and he would have been entitled to present evidence in his own defense but was never given notice of or an opportunity to be heard in connection with any termination proceeding.”³ Applicant voluntarily resigned from the police department on March 25, 2003.

The Judge noted in his findings that one of Applicant’s witnesses was a fellow police officer, who testified that the police department had been poorly led, that superior officers would often harass subordinates, that punishments were not consistent, and that grievances “went nowhere.”⁴

B. Discussion

The Appeal Board’s review of the Judge’s findings of facts is limited to determining if they are supported by substantial evidence—“such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Throughout her brief, Department Counsel identifies record evidence which she contends the Judge did not properly consider. We will address this in the Conclusions section.

Whether the Record Supports the Judge’s Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

As a preliminary matter the Board must address an issue raised on appeal as to whether the Judge properly considered the record as a whole. Although there is a general presumption that a Judge has considered all the record evidence, that presumption is qualified. The qualification is “unless the Judge specifically states otherwise.” *See, e.g.*, ISCR Case No. 06-10950 at 2 (App. Bd. Jul. 25, 2007). In this case the Judge comes very close to stating that he has not considered all the record evidence.

The Judge states in Footnote 2 of the Decision: “After reviewing the transcript, I have decided to adopt Applicant’s answers to the SOR as the basis for my findings of fact. His answers

³*Id.*

⁴Decision at 5.

state the case and present the issues much more succinctly than trying to cobble together gleanings from the transcript.”

The Board cannot determine with confidence that the Judge has based his decision on available record evidence. The above quoted language suggests that the Judge may well have excluded relevant evidence, or at least seriously discounted it, without adequate justification. Furthermore, Department Counsel correctly notes that in at least one instance, Applicant himself acknowledged at the hearing that his answer to the SOR was “written incorrectly.” *See* Transcript, at p.113. Thus, based on his notion that evidence in the SOR answer was more “succinct” than evidence in the transcript, it appears that the Judge may have failed to consider properly evidence that conflicts with evidence in the SOR answer. A Judge is required to weigh conflicting evidence and to resolve such conflicts based upon a careful evaluation of factors such as the comparative reliability, plausibility and ultimate truthfulness of conflicting pieces of evidence. In this case, the Judge may have excluded a large block of evidence solely as a result of his dissatisfaction with the presentation of that evidence. To have done so is error. In light of this issue it is premature to address any other appeal issue. The case is remanded to the Judge to issue a new decision in which he evenhandedly considers all record evidence.

Order

The Judge’s favorable security clearance decision is REMANDED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I respectfully disagree with my colleagues. I do not interpret the footnote in question as constituting the Judge’s admission that he did not consider the transcript, insofar as he states explicitly that he reviewed it. I take it to mean that, after his review of the transcript, he concluded that the Applicant’s SOR answers were founded upon substantial evidence. *See* Directive ¶

E3.1.32.1. Whether this conclusion is reasonable is a matter that, having been raised by Department Counsel, should be resolved by the Board in its exercise of appellate review. Indeed, whether a Judge's decision reflects a reasonable examination of relevant evidence is one of the criteria which the Board applies in deciding whether a decision is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). I would resolve this case on its merits rather than remand it.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board